Supreme Court, U.S.
FILED
DEC 8 1994
OFFICE OF THE CLERK

(3)

No. 94-792

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

HALLCO MANUFACTURING, CO., INC.
and OLOF A. HALLSTROM, *Petitioners*,
v.
RAYMOND KEITH FOSTER, KEITH MFG. CO.,
INC. and KEITH SALES CO., *Respondents*.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit

PETITIONERS' REPLY BRIEF

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December 8, 1994

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PETITIONERS' REPLY BRIEF

I. INTRODUCTION

The Respondents' (collectively "Foster") arguments highlight, by omission, why this Court should grant the Petition. Foster fails to cite any authority --because none exists-- to contradict the fact that: (1) in the entire fifty-six year history of Rule 60(b), this Court has *never* ruled on what standard the lower courts should use in determining whether to grant a motion

under Rule 60(b)(3); and (2) this Court has not in fifty years elaborated on the application of the "fraud on the court" saving provision of Rule 60(b). See, Hazel-Atlas Glass Co. v. Hartford Empire Company, 322 U.S. 238 (1944). In a misleading and largely irrelevant presentation of the facts, Foster attempts to divert the focus from the clear need for establishing legal guidelines. Contrary to Foster's argument, Interrogatory Nos. 13, 15 and 16 are irrelevant, the Petitioners' (collectively "Hallco") Petition is accurate that Foster never has presented evidence contradicting Hallco's evidence of alteration of PX 162 or that Foster's misconduct affected the trial, and the district court's opinion clearly shows that it gave no weight to the jury verdict that Foster altered the exhibit in attempt to mislead the court and jury.

II. FACTUAL MATTERS

A. The Other Jury Interrogatories are Irrelevant to this Petition.

Foster's discussion regarding the best mode and the other jury findings is irrelevant to present action. The only relevant argument is where Foster says that there is no connection between the best mode issue and the alteration of PX 162 (Brf in Opp 6), but even this argument

misses the point. The alteration of PX 162 affected Hallco's trial of its case which included the best mode issue. Uncontroverted evidence shows that Hallco's trial of its case was affected by having to deal with Foster's fraud, to the extent that Hallco did not spend sufficient time rebutting Foster's best mode evidence. Foster agrees that where fraud has been demonstrated and the trial has been affected by the fraud, a new trial is required under Rule 60(b)(3) and 60(b) saving provision.

B. The District Court's Handling of the Wilkins 1973 Trailer Jury Interrogatory Shows that it Knew there was Fraud, but the Court's Refusal to Enter that Verdict was an Insufficient Remedy for the Fraud.

Foster argues that Interrogatory 15 shows that the Hallstrom '760 patent is invalid, based upon a sale more than one year before the filing date of the patent (Brf in Opp 6-8). But the district court refused to enter this verdict as a part of its judgment, undoubtedly because it recognized that Foster's fraud permeated the presentation of the evidence on this point. However, the court's refusal to enter this verdict was an insufficient remedy. Because the uncontradicted evidence showed that Foster's fraud

affected the trial of Hallco's case, Hallco was entitled to a new trial.

C. The Jury's Verdict as to the 1991 Affidavit is Irrelevant.

Foster is correct that the jury refused to find that Foster engaged in fraud in the filing of a 1991 affidavit relating to the Wilkins 1973 trailer (Interrogatory No. 16). However, this is unrelated to the jury verdict that Foster fraudulently altered the trial exhibit. For example, the so-called "shiny spot" was not even evident in the photographs appended to the 1991 affidavit, so the jury was unable to determine whether the drive had been altered prior to the preparation of the 1991 affidavit.

D. Foster's Discussion of PX 162 is Misleading and Never Does Explain the Critical Shiny Spot.

Foster contends that PX 162 operated in the 1-2-3 mode back in 1973 (Brf in Opp 12). But if alterations to PX 162 resulted in a shiny spot, it is undisputed that the shiny spot would not remain twenty years later because the unit had been outside in the rain for most of that time (pp. 1094-95 of joint appendix for appeal to Court of Appeals for the Federal Circuit, hereinafter "A"). It is undisputed that Foster had sole custody of PX 162 during that entire time. The only

explanation presented by Foster during the trial was that of its attorney in his closing argument where he said that "we are concerned" and "[i]t bothered me to see that."

E. Foster's Contentions Regarding the Evidence of Alteration are Baseless.

Foster's contention that the testimony of various witnesses supports its position on PX 162 is totally without basis (Brf in Opp 17). Foster's argument with regard to the Wilkins 1973 trailer is based on its contention that PX 162 was the actual drive unit used in the Wilkins 1973 trailer; however, none of the witnesses (other than Foster himself) testified that PX 162 was the actual drive unit in that trailer.

With regard to the cam plate, it could not have been removed to reveal the shiny spot back in 1973, because even Foster agreed that the unit had been in the rain for almost twenty years.

Recognizing that the shiny spot could not have remained shiny for almost twenty years of exposure, Foster now contends that PX 162 was steam-cleaned shortly before trial. However, Hallco presented photographs at trial showing that the shiny spot existed some six months prior to trial. Nowhere in the evidence is there any explanation for this shiny spot other than the conclusion the jury

reached, that is, that the shiny spot was there because Foster broke off the cam plate to alter the drive unit to operate in the 1-2-3 mode of motion in the period preceding Hallco's inspection six months prior to trial. It could not have been later than that because of Hallco's photographs. It could not have been back in 1973 because it would not have remained shiny for so many years.

F. The District Court Gave No Weight to the Jury's Verdict That Foster Attempted to Mislead.

Contrary to Foster's argument, the district court clearly ignored Interrogatory No. 17 and made it's own finding when it said "the court does not *separately* find that Hallco has shown by clear and convincing evidence that Foster willfully attempted to mislead the court and the jury" (emphasis added). The court did not, as it should have, give deference to the jury verdict. The district court's failure to give any credence at all to the jury verdict undermines the integrity of the judicial process and the faith which jurors and others place in the system.

III. REPLY AS TO FOSTER'S LEGAL CONTENTIONS

A. Foster Presents No Evidence Contradicting Hallco's Evidence Showing the Effect of Foster's Misconduct.

In its Brief in Opposition, Foster does not discuss any evidence that contradicts Hallco's evidence that the trial of this case was affected. Hallco submitted evidence to the district court (including affidavit at A1148) that showed how Foster's misconduct substantially interfered with the trial of its case.

B. Response to Foster's Additional Questions.

Foster presents additional questions in its brief because it misunderstands the record and does not appreciate the legal issues raised in Hallco's Petition. Foster's questions are not supported by the record and distract this Court's attention from the key legal issues (raised in the Petition's questions presented) on which the Petition should be granted.

For the sake of completeness, however, Hallco will summarily respond to the questions noted at page i of Foster's Brief:

1. In Foster's first question, it asks if the clear and convincing standard

is a blanket requirement for fraud-related Rule 60(b) motions. The answer is no. No authority exists that establishes that the clear and convincing standard applies to Rule 60(b) "fraud on the court" motions.

Therefore, Interrogatory No. 17 finding misconduct was binding as to a Rule 60(b) "fraud on the court" motion (Pet 16-17). Foster presents no authority to contradict this conclusion.

2. Foster next asks if the district court abused its discretion. This question misses one of the points raised in Hallco's Petition that the district court lacked a defined standard to decide a Rule 60(b) motion when presented with uncontroverted *prima facie* evidence demonstrating misconduct (Pet 9-13).

As discussed *supra*, Foster contends that the testimony of various witnesses contradicts Hallco's *prima facie* showing of misconduct (Brf in Opp 17). However, in order for the testimony of these witnesses to support Foster's argument, PX 162 (the subject of the witnesses' testimony) must be the actual drive unit used in the Wilkins 1973 trailer. Foster is the only one who testified that PX 162 was the actual drive unit which was installed in that trailer. Therefore, the testimony of the other witnesses does not controvert Hallco's evidence of misconduct by Foster.

3. As to Foster's third question, it is not necessary for Hallco to show that there is a best mode case before a court can grant a new trial motion. Foster's sole support for its position is the Restatement, Second, Judgments § 70, but the language Foster quotes (Brf in Opp 28) is merely from the commentary to the Restatement which has never, to Hallco's knowledge, ever been adopted by any court in any jurisdiction.

IV. CONCLUSION

For the foregoing reasons, Hallco's Petition should be granted.

Respectfully submitted,

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